MUNICIPALITY OF ANCHORAGE
BOARD OF ADJUSTMENT APPEAL NUMBER 2018-1 FROM
ANCHORAGE PLATTING BOARD'S FEBRUARY 7, 2018 FINDINGS OF FACT AND DECISION IN
CASE NUMBER S12388

BOARD OF ADJUSTMENT FINDINGS AND CONCLUSIONS

WHEREAS, on October 25, 2017, Big Country Enterprises, LLC ("Big Country" or "Appellee") submitted an application to the Anchorage Planning Department ("Planning Department") for approval of a preliminary plat for a conservation subdivision with phased planning, along with an application requesting a variance from Anchorage Municipal Code ("AMC") 21.08.030F.6.a.'s maximum cul-de-sac length;

WHEREAS, on November 9, 2017, Big Country submitted an additional application to the Planning Department requesting two variances for its proposed conservation subdivision from AMC 21.07.060D.3.b.ii.'s requirement for a ten-foot wide pedestrian access route between each cul-de-sac and the closest adjacent street;

WHEREAS, on January 3, 2018, the Anchorage Platting Board held a public hearing regarding Big Country's applications;

WHEREAS, on February 7, 2018, the Platting Board issued its written findings of fact and decision, approving Big Country's preliminary plat, phasing plan, and three variances;

WHEREAS, Joan Priestley and 19 other individuals (the "Appellants"), collectively and timely appealed the Platting Board's February 7, 2018 decision to the Board of Adjustment;

WHEREAS on November 8, 2018, the Board of Adjustment deliberated and decided the appeal at a meeting open to the public and pursuant to new Title 21;

NOW, THEREFORE, BE IT RESOLVED, the Board of Adjustment adopts the following Findings and Conclusions:

FINDINGS

A. The Board of Adjustment only considered the appeal based on the record established before the Platting Board and prepared by the municipal clerk, the briefs, and the law.

1. AMC mandates the Board of Adjustment "consider an appeal solely on the basis of the record established before the lower administrative body."[1] Moreover AMC dictates the municipal clerk will create the Record on Appeal and it will include: "[c]opies from the department of all documentary evidence, memoranda, exhibits, correspondence, and other written material submitted to the administrative body prior to the decision from which the appeal is taken."[2]

2. By order dated May 11, 2018 the Board of Adjustment directed Appellants to submit a new brief that did not contain exhibits outside the Record on Appeal. Nonetheless the briefs submitted in this appeal contain exhibits outside the Record on Appeal.

3. The Appellants' Notice of Appeal, its corrected Brief, and its Reply Brief, as well as Appellee's Brief, include exhibits that are not part of the Record on Appeal created by the municipal clerk. The Appellants' Notice of Appeal includes 13 exhibits which are not part of the Record on Appeal, including Exhibits 4, 18-22A, 25, 27-29, 31, and 34. Exhibits 1 and 2 in Appellants' Brief and Exhibits A, B, and C in Appellants' Reply Brief, as well as the one attachment to Appellee's Brief, titled "Hillside District Plan- Land Use Chapter 2 Land Use," are not part of the Record on Appeal.

4. By vote of 3 to 0 the Board of Adjustment finds Exhibits 18-22A, 25, 27-29, 31, and 34 in Appellants' Notice of Appeal; Exhibits 1 and 2 in Appellants' Brief; and Exhibits B and C in Appellants' Reply Brief cannot be and were not considered by the Board of Adjustment in this appeal.

5. While the Hillside District Plan is not part of the Record on Appeal, the Hillside District Plan was approved by the Anchorage Assembly on April 13, 2010 and is part of Anchorage's legal framework.

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[1] AMC 21.03.050A.11.a.
[2] AMC 21.03.050A.6.b.iii.

6. The Board of Adjustment, by a vote of 3 to 0, takes judicial notice of the Hillside District Plan.[3]

B. Insufficient evidence supports the Platting Board's decision under AMC 21.03.240.G.3.a-d to approve the Canyon Road Variance.

1. When a cul-de-sac is created, AMC 21.07.060D.3.b.ii requires "at least one ten-foot wide pedestrian access right-of-way or easement . . . to the extent reasonably feasible, between each cul-de-sac head . . . and the closest adjacent street or pedestrian walkway."[4]

2. Big Country submitted an application to the Planning Department requesting two variances from AMC 21.07.060D.3.b.ii, one for the required pedestrian walkway between Brownson Circle and Upper DeArmoun Road and one for the required pedestrian walkway between Lewis & Clark Circle and Canyon Road ("Canyon Road Variance").[5] The Platting Board granted both variances, and, relevantly, found the Canyon Road Variance "met the approval criteria of AMC 21.03.240."[6]

3. AMC 21.03.240G requires four conditions to be met for the Platting Board to grant the Canyon Road Variance: (a) "special circumstances or conditions" must be present and "affecting the property such that the strict application of the provisions . . . would clearly be impractical, unreasonable, or undesirable to the general public"; (2) the variance "will not be detrimental to the public welfare or injurious to other property in the area"; (3) the "variance will not have the effect of nullifying the intent and purpose of the subdivision regulations or the comprehensive plan of the municipality"; and (4) strict compliance with the subdivision regulations would cause "undue hardship."[7]

4. AMC 21.03.240F.3 mandates the Platting Board issue, along with a variance approval or denial, "written findings of fact that the variance meets or does not meet each of the applicable criteria set forth in subsection G., stating the reasons for such findings." Here the

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[3] *Lopez v. Administrator,* 20 P.3d 568, 576 (Alaska 2001) (rules of evidence permit judicial notice of facts "not subject to reasonable dispute"); *see also* Evidence Rules Commentary, Rule 201(a) (the Alaska Evidence Rules Commentary fleshes out this standard as "rational minds would not dispute the fact that the court notices").
[4] AMC 21.07.060D.3.b.ii.
[5] R.185-86.
[6] R.185.
[7] AMC 21.03.240.G.3.a-d.

Platting Board's written findings fail to specifically address and detail whether the Canyon Road Variance met each of the applicable criteria set forth in AMC 21.03.240.G.3.a-d.[8]

5. Mr. Pugh's testimony on behalf of the Rabbit Creek Community Council indicated the Community Council withdrew its comments regarding the required pedestrian walkway implicated in the Canyon Road Variance.[9]

6. Citing to road construction on Canyon Road as support for granting the Canyon Road Variance is inappropriate, as road construction is only temporary, whereas a variance is permanent.[10]

7. The Preliminary Plat for the conservation subdivision demonstrates the proposed conservation subdivision is adjacent to Upper DeArmoun Road, which lacks adequate pedestrian walkways.[11]

8. With regard to the Canyon Road Variance the Platting Board's finding that "[t]he pedestrian route by road is only 200 feet longer" than the otherwise code-required pedestrian path, incorrectly reflects the record.[12] The Planning Department's staff analysis found the code-required pedestrian path "is approximately 2,200 feet shorter" than walking along the road.[13]

9. The Board of Adjustment, by a vote of 3 to 0, finds insufficient evidence supports the Platting Board's decision to approve the Canyon Road Variance under AMC 21.03.240.G.3.a-d.

C. The Platting Board did not commit a procedural error by failing to require a plat note detailing the maximum lot coverage in the conservation subdivision under AMC 21.08.070B.5.

1. Big Country's application for preliminary plat approval states the maximum lot coverage allowed under the proposed conservation subdivision is 15%, based on AMC 21.08.070B.5.[14] In its analysis the Planning Department, applying AMC 21.08.070B.5, found the

[8] R.191-92.
[9] T.26.
[10] T.56.
[11] R.237.
[12] R.192; T.56.
[13] R.192, 233.
[14] R.248.

lot coverage allowed in Big Country's proposed conservation subdivision would be 5.5%.[15] The Platting Board did not address this discrepancy during the public hearing or in its written decision and Big Country has not challenged the Planning Department's code interpretation.

2. Appellants assert the Platting Board "has the authority (and duty to the public)" to include a plat note on the subdivision's plat clarifying the allowable lot coverage.[16] Appellants do not assert the Platting Board failed to correctly interpret the maximum lot coverage code provision (AMC 21.08.070B.5), but rather that the Platting Board should have identified and resolved — with a plat note — the discrepancy in the Planning Department's and Big Country's interpretation of that provision.[17] Appellants fail to cite any authority supporting their assertion that the Platting Board has authority or the duty to clarify the code requirements with a plat note.

3. AMC 21.03.200C.8.e requires a plat to include a plat note when the Platting Board places a condition upon final plat approval that "entails a restriction upon the use of all or part of the property being subdivided."

4. The Platting Board approved Big Country's preliminary plat application subject to several conditions, including a condition requiring a plat note stating: "Development of lots within this subdivision are subject to AMC 21.08.070B, *Conservation Subdivisions*, or as specified in future adopted provisions of AMC 21."[18]

5. AMC Title 21 provides the basis to determine the permissible maximum lot coverage in this conservation subdivision. AMC Table 21.06-1, which details residential dimensional standards, imposes a 5% maximum lot coverage on R-8 zoning district lots. AMC 21.08.070B.5, however, permits the maximum lot coverage "set forth in Chapter 21.06" to be "increased by no more than 10 percent."

6. The Board of Adjustment, by a vote of 3 to 0, finds the Platting Board did not commit a procedural error by failing to require a plat note detailing the maximum lot coverage in the conservation subdivision under AMC 21.08.070B.5.

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[15] R.230.
[16] Appellants' Brief, 5-6.
[17] Appellants' Brief, 3. Appellants argue Big Country make a "mistake of statutory interpretation." The BOA is tasked with reviewing the Platting Board's findings and decisions, not Big Country's application or its code interpretation.
[18] T.57,L.9-15; T.61; R.199, 212, 236.

D. AMC 21.08.070B.4.h requires 100-foot wide common open space with level 4 screening landscaping along the western lot line of lots 13 and 14 in the conservation subdivision.

1. This is a legal issue requiring the Board of Adjustment to exercise its independent judgment to interpret the code provision at issue — AMC 21.08.070B.4.h.[19]

2. AMC 21.08.070B.4.h states: "Common open space with level 4 Screening landscaping shall be provided along any lot line abutting a residential neighborhood where any adjoining lot is greater than 150 percent of the average lot size along that lot line of the conservation subdivision. In class B areas this abutting landscaped open space area shall be 100 feet wide."

3. AMC 21.14.020 outlines general rules when "construing or interpreting the terms and provisions" in Title 21. Relevantly and in accordance with binding caselaw, AMC 21.14.020 states: ordinances should be "construed according to the general purposes set forth in Section 21.01.030 and the specific purpose statements set forth throughout this title"; purpose statements "are provided to guide interpretation and understanding of the legislative intent behind the substantive regulations"; "[w]ords and phrases shall be construed according to the common and approved usage of the language"; and "shall" denotes mandatory.[20]

4. AMC 21.14.040 defines several of the provision's terms. It defines "lot line" as "[t]he fixed boundaries or property lines of a lot described by survey located on a plat" and "lot" as "[a] unit of land within a subdivision, bounded by streets and/or other lots, that is described and fixed on the most recent plat."[21] AMC also defines front, rear, and side lot line, further indicating "lot line" refers to only one boundary line of one lot.[22] AMC 21.14.040 defines "tract" as "[a] parcel of land which has been reserved for future development, future subdivision, or protection of open space or a specific natural feature(s)."

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[19] AMC 21.03.050A.11.b.

[20] AMC 21.14.030. The interpretation guidelines in AMC 21.14.030 mirror those provided in caselaw. *See Central Recycling v. Mun. of Anchorage*, 389 P.3d 54, 57 (Alaska 2017) (when interpreting a municipal ordinance "look at both its plain language and . . . its legislative history" and "whenever possible" construe an ordinance "in light of its purpose"); *see also Foreman v. Anchorage Equal Rights Com'n*, 779 P.2d 1199, 1201 (Alaska 1989) (citing *Wilson v. Mun. of Anchorage*, 669 P.2d 569, 571-72 (Alaska 1983)) ("When interpreting an ordinance or a statutory provision, words are given their ordinary and common meaning.").

[21] AMC 21.14.040.

[22] *Id.*

5. A conservation subdivision's purpose is to allow lots "to be smaller in area or narrower than otherwise required in the zoning district" but keep the total number of lots within the conservation subdivision the same as permitted in the zoning district.[23] Additionally, a conservation subdivision is "intended to create a more compact residential development to preserve and maintain open areas, high value natural lands, and lands unsuitable for development, in excess of what would otherwise be required."[24]

6. Based on the conservation subdivision's purpose, as well as the provision's plain language, AMC 21.08.070B.4.h is intended to protect existing and abutting larger lots from more compact development permitted in a conservation subdivision.

7. The Board of Adjustment, by a vote of 3-0, finds AMC 21.08.070B.4.h to require 100-foot-wide common open space with level 4 screening landscaping adjacent to the west property lines of lots 13 and 14 in Big Country's approved preliminary plat.

E. Substantial evidence supports the Platting Board's implicit factual finding that Big Country's application accurately reflected the conservation subdivision's total acreage.

1. Appellants claim a discrepancy in Big Country's proposed subdivision's total acreage exists and evidences a procedural error.[25] Appellants fail to cite to any code-required procedure that the purported discrepancy violates and instead raise a factual issue, challenging the Platting Board's implicit factual finding that the preliminary plat application accurately reflected the total acreage in Big Country's proposed conservation subdivision.

2. The Board of Adjustment has authority to affirm, reverse, or modify the Platting Board's decision in whole or part.[26] But the BOA lacks authority to place additional procedural requirements on Big Country's future plats, applications, and other documents, as requested by Appellants.[27]

3. The Platting Board did not specifically include a finding about the conservation subdivision's total acreage, but because the Platting Board approved the preliminary plat, the

[23] AMC 21.08.070B.1.
[24] AMC 21.08.070B.1.
[25] Appellants' Brief, 8-10.
[26] AMC 21.03.050A.12.a.
[27] Appellants' Brief, 11, 12.

Platting Board implicitly found Big Country's application accurately reflected the conservation subdivision's total acreage.[28]

4. Big Country's application for preliminary plat submitted to the Municipal Planning Department states the plat contains 70.5 acres and specifically excludes from the property's legal description the NW ¼ NW ¼ SE ¼ of Section 25.[29] Testimony on Big Country's behalf at the Platting Board's January 3, 2018 hearing states the area to be developed is 70 acres.[30]

5. Consistent with Big Country's preliminary plat application, the 2017 Terrasat Report states the proposed subdivision comprises approximately 80 acres of undeveloped land, but ten acres in the parcel's northwest corner may not be included in the development plat.[31]

6. The Planning Department's staff analysis states the site contains 70.5 acres and does not raise any issue with Big Country's total acreage.[32]

7. The 2017 Triad Engineering Preliminary Drainage Impact Analysis states the "project intends to develop the 70-acre parcel" and includes a location map, which, like the other information, excludes the northwest corner from the area to be developed.[33]

8. The acreage estimate on Big Country's subdivision worksheet excludes roads, rights of way, and other common areas, and thus lists the "Net area total" as 65.63 acres.[34] This net acreage is a different acreage calculation, but is consistent with the plat's gross acreage.

9. The Board of Adjustment, by a vote of 3 to 0, finds substantial evidence supports the Platting Board's implicit finding that Big Country's preliminary plat application accurately reflected the conservation subdivision's total acreage.

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[28] R.193.
[29] R.242.
[30] T.14.
[31] R.411.
[32] R. 222.
[33] R.270-71.
[34] R.250.

F. The Platting Board did not commit a procedural error by failing to require plat maps and plat notes of the proposed subdivision to include riparian and stream setbacks.

1. AMC 21.03.200C.8.e requires a plat to include a plat note when the Platting Board places a condition upon final plat approval that "entails a restriction upon the use of all or part of the property being subdivided."

2. The Platting Board approved the subdivision's preliminary plat application subject to a plat note specifically addressing stream setbacks.[35] The plat note states: "There are streams located within the subdivision and the stream setbacks will be specified in AMC 21.07.020 or as specified in future adopted provisions of AMC 21. Portions of streams contained within mapped wetlands are subject to setbacks as described in the Anchorage Wetlands Management Plan."[36] It follows that all lots within the conservation subdivision are subject to, and must comply with, AMC 21.07.020B.4.a.i-vi.

3. The Platting Board's decision, referencing code requirements and mandating a plat note regarding adherence to setback requirements, is sufficient. The Platting Board is under no affirmative obligation to include an additional plat note about the amount of undevelopable land in each lot due to stream setbacks or to delineate the stream setbacks on a plat map.

4. The Board of Adjustment, by a vote of 3 to 0, finds no procedural error has occurred by the Platting Board failing to require plat maps and plat notes of the proposed subdivision to include riparian and stream setbacks.

G. The Platting Board did not commit a procedural error by not requiring the applicant to provide additional reports and technical review before approving the preliminary plat.

1. AMC 21.03.200 and other code provisions establish general requirements for a subdivision application, including required reports and permits. AMC 21.03.200C.4.c requires applicants to initiate a Corps of Engineers' wetland permitting prior to submitting the preliminary plat. AMC 21.03.200C.6 requires the Planning Department to "review each proposed preliminary plat in light of the approval criteria of subsection C.9 . . . and distribute the application to other reviewers as deemed necessary." Additionally AMC 21.08.030H requires subdivisions on slopes to provide "a geotechnical engineering report" that includes site geology,

[35] T.57, 61; R.199, 212, 236.
[36] R.199.

slope stability analysis, conclusions regarding development adequacy (including specific recommendations for procedures to mitigate "hazards, slope failures, and soil erosion, and to minimize disturbance on natural ecological and drainage functions"), and a summary of field methods and test performed.

2. The following reports were provided by Big Country, reviewed by the Planning Department, and are part of the Record on Appeal:

a. Preliminary Drainage Impact Analysis: Triad Engineering, dated October 2017;[37]

b. Geotechnical Soils Report: Northrim Engineering, dated February 2017;[38]

c. Soil log, percolation test: Garness Engineering Group, Ltd, dated April 22, 2015 and January 28, 2015;[39]

d. Wetland determination letter: Army Corps of Engineers, dated June 5, 2015;[40]

e. Preliminary Determination of Wetlands & Waters: Hemlock Scientific, LLC, dated December 22, 2014;[41]

f. Ground Water Resource Evaluation for the Proposed Lewis and Clark Subdivision: Terrasat Environmental, dated February 16, 2017.[42]

3. Additionally as a condition of approval, the Platting Board requires Big Country "to prove to MOA On-Site Water and Wastewater Services Division that AMC Title 15 regulations are met for each lot," and that the "required information includes soils testing, percolation testing, and groundwater monitoring."[43]

4. The Board of Adjustment, by a vote of 3 to 0, finds the Platting Board did not commit a procedural error by not requiring the applicant to provide additional reports and technical review before approving the preliminary plat.

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[37] R.268-287.
[38] R.288-306.
[39] R.307-317.
[40] R.318-321.
[41] R.322-407.
[42] R.408-429.
[43] R.192.

H. Preliminary plat approved by Platting Board complies with minimum lot size exception under AMC 21.08.070B.4.

1. This is a legal issue requiring the Board of Adjustment to exercise its independent judgment to interpret the code provision at issue — AMC 21.08.070B.4.[44]

2. AMC 21.08.070B.4 states, in part: "Conservation subdivisions may include one or more lots that do not conform to the minimum lot size or lot width requirements of Chapter 21.06."

3. Appellants argue that AMC 21.08.070B.4 does not mean all lots may be nonconforming, but rather "one or a few" lots may be nonconforming.[45] And, as a result, Appellants claim the Platting Board incorrectly interpreted AMC 21.08.070B.4 to approve Big Country's preliminary plat application, where "15 of the 16 lots are less than the 4 acre size and the 300 foot width, required for an R-8 zone."[46]

4. To interpret AMC 21.08.070B.4 the Board of Adjustment, guided by AMC 21.14.020, looks to the code's words and phrases, which, unless technical in nature, should "be construed according to the common and approved usage."[47] Additionally AMC 21.14.020 directs the Board of Adjustment to interpret the code in light of its purpose statement, which "guide[s] interpretation and understanding of the legislative intent behind the substantive regulations."[48]

5. The common use of "one or more," along with the conservation subdivision's purpose statement, suggest there is no limit on the number of lots in a conservation subdivision that may be smaller in area than otherwise permitted in the zoning district.

6. First, "one or more" contains common, not technical, words that simply mean "one" or "more than one lot." On its face, "more" does not eliminate the possibility of most, a majority, or even all lots, as "all" qualifies as more than one lot.

7. Second, the conservation subdivision's purpose is to provide "an alternative type of residential development in which *the lots are allowed to be smaller in area or narrower than*

[44] AMC 21.03.050A.11.b.
[45] Appellants' Brief, 16-21; Appellants' Reply Brief, 7-8.
[46] Appellants' Brief, 16-21.
[47] AMC 21.14.020.
[48] AMC 21.14.020.

otherwise required in the zoning district, but in which the overall number of lots does not exceed the maximum number of lots allowed in a conventional subdivision by the zoning district."[49] Significantly the purpose statement allows "*lots*" (plural) to be smaller and does not limit the number of lots permitted to be smaller. A conservation subdivision is also "intended to create a more compact residential development to preserve and maintain open areas, high value natural lands, and lands unsuitable for development, in excess of what would otherwise be required by this title."[50] Allowing for smaller lots in a conservation subdivision increases the sought-after open areas, as "[t]he amount of any reduction in minimum lot size shall be used for common open space."[51]

8. Interpreting "one or more" as not imposing a limit on the number of smaller lots not only adheres to the common use of "more," but also promotes the conservation subdivision's purpose.

9. If the Anchorage Assembly had desired to place a limit on the number of lots that could be smaller in a conservation subdivision, it would have included such a limit. AMC 21.08.070B.4, however, includes no limit.

10. The Board of Adjustment, by a vote of 3 to 0, finds the preliminary plat approved by Platting Board complies with the minimum lot size exception under AMC 21.08.070B.4.

CONCLUSIONS

1. This appeal was heard in accordance with AMC 21.30.090.

2. The meeting at which the Board of Adjustment decided this appeal was held in accordance with AMC 21.30.080.

3. Insufficient evidence supports the Platting Board's decision under AMC 21.03.240.G.3.a-d to approve the Canyon Road Variance. As a result, the Board of Adjustment, by a vote of 3-0, remands this issue to the Platting Board with direction to take further evidence at a public hearing on whether the Canyon Road Variance meets the four criteria in AMC

[49] AMC 21.08.070B.1 (emphasis added).
[50] AMC 21.08.070B.1.
[51] AMC 21.08.070B.4.a.

21.03.240G.3 and to state with specificity in the Platting Board's written findings whether or not the Canyon Road Variance meets the four criteria in AMC 21.03.240G.3.

4. The Board of Adjustment, exercising its independent judgment, interprets AMC 21.08.070B.4.h to require 100-foot wide common open space with level 4 screening landscaping along the western lot line of lots 13 and 14 in the conservation subdivision. The Board of Adjustment, by a vote of 3 to 0, modifies the Platting Board's decision by adding a provision as a condition of approval of Big Country's Preliminary Plat that it must adhere to AMC 21.08.070B.4.h in accordance with the Board of Adjustment's Findings and Conclusions herein.

5. All other findings and decisions of the Platting Board in case number S12388 are affirmed.

6. Pursuant to AMC 21.03.050A.13.d. because the Board of Adjustment has remanded one issue to the Platting Board, this decision is not a final decision with respect to any issues involved in the appeal. This decision will be a final decision with respect to all matters affirmed by the board of adjustment's decision, when, following service of the lower administrative body's decision on remand, no appeal is perfected within the period specified in subsection AMC 21.03.050A.4.[52] The parties have 30 days from the expiration of that period to appeal the final Board of Adjustment decision to the superior court.

ADOPTED by the Board of Adjustment this 9th day of November 2018.

Bernd Guetschow, Chair
on his own behalf and on behalf
of Board of Adjustment Members
Robert Stewart and Tamas Deak

[52] AMC 21.03.050A.13.d.

Certificate of Service:

I hereby certify that on the 20th day of November, 2018 a true and correct copy of the *Findings of Fact and Decision* in BOA Appeal 2018-1 was served by electronic mail upon each of the following:

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